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No. 01-1853

Supreme Court, U.S.
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In The
Supreme Court of the United States

In the Matter of the Estate of
Marshall G. Gardiner, Deceased

J'NOEL GARDINER, PH.D.,

Petitioner,

v.

JOSEPH M. GARDINER, III,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas

RESPONDENT'S BRIEF IN OPPOSITION

JOHN F. THOMPSON
DAVIS, BEALL, MCGUIRE & THOMPSON, L.L.C.
529 Delaware
Leavenworth, Kansas 66048
(913) 682-3822

TERENCE A. LOBER *
Attorney at Law
529 Delaware
Leavenworth, Kansas 66048
(913) 682-3825

**Counsel of Record*

Counsel for Respondent, Joseph M. Gardiner, III

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QUESTION PRESENTED

This case involves the claim of J'Noel Ball, a/k/a J'Noel Gardiner,[1] a post-operative male-to-female transsexual, to a spousal share of the estate of Marshall G. Gardiner, deceased. J'Noel was born a male, but voluntarily elected to undergo "sexual reassignment surgery". At the completion of the process, J'Noel obtained a birth certificate from the State of Wisconsin changing her sex from male to female. In contrast, Marshall G. Gardiner was born a male on August 27, 1912 and remained a male until his death on August 12, 1999.

Kansas requires that in order for a marriage to be valid, the parties to the marriage must be of the "opposite sex". K.S.A. 23-101. The issue presented at the outset of this case was simply: "Was J'Noel a male or female at the time of her purported marriage to Marshall G. Gardiner?" If she is a female, she would be entitled to a spousal share of his estate.[2] If she is a male, the marriage is void. In the Court below, it ruled that K.S.A. 2001 Supp. 23-101 and K.S.A. 2001 Supp. 23-115 requires Kansas to recognize only traditional marriages. The Kansas Supreme Court ruled that pursuant to K.S.A. 2001 Supp. 23-101, a marriage between a post-operative male-to-female transsexual and a male is void and against the public policy of the State of Kansas. Specifically and to the point, it held that since

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[1] For purposes of this Response, J'Noel Gardiner, a/k/a J'Noel Ball will simply be referred to as "J'Noel".

[2] The exact amount of her share remains an issue in the probate case.

QUESTION PRESENTED – Continued

K.S.A. 2001 Supp. 23-101 was silent on the subject matter of transsexuals, they are simply not included within the traditional definition of male and female. The Kansas Court found that if the Kansas legislature had intended to include transsexuals it would have been a simple matter to have done so. In conclusion, the Kansas Court stated, "We do not read into the statute something that does not come within the wording of the statute." Pet., App. 38a.[3]

The narrow question framed by the Petitioner is whether Article 4, Clause 1 of the Constitution of the United States requires full faith and credit to be given to the Wisconsin birth certificate stating that J'Noel is a female. Petitioner urges this result notwithstanding the fact that the Kansas Supreme Court found that such a result would violate the public policy of Kansas concerning traditional marriages.

The Leavenworth County District Court, the Kansas Court of Appeals, and the Kansas Supreme Court all found that the birth certificate issued by the State of Wisconsin was not entitled to full faith and credit for the reasons set forth in the opinions below.

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[3] This rationale apparently follows the statement of Justice Scalia who wrote: "[I]t is simply not compatible with democratic theory that laws mean what they ought to mean, and that unelected judges decide what that is." Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 38 (1997).

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Kansas Supreme Court entered on June 12, 2002.

STATEMENT OF THE CASE

The fascinating facts of this case are stated in great detail in the briefs and opinions below. However, there are additional relevant facts which merit attention. Some facts are repeated herein to give the Statement of the Case continuity.

Joseph M. Gardiner, III ("Joe"), is the adult son and sole heir-at-law of the decedent, Marshall G. Gardiner. Pet., App. 43a. Marshall G. Gardiner ("Marshall") was born a male in Oskaloosa, Kansas in 1912 and lived in the Leavenworth area his entire life. Marshall married Molly North in 1942. Joe was born to Molly and Marshall in 1947. Pet., App. 45a. Molly died in 1984. Marshall met J'Noel in May of 1998 at a function sponsored by Park University. 1 Record on Appeal 118. Marshall was a substantial financial contributor to the school. J'Noel was a new associate professor of finance. 1 Record on Appeal 118. Marshall and J'Noel began dating and were discussing marriage within a month of their introduction by Park University. Pet., App. 46a.

However, Marshall demanded a premarital agreement prior to marriage. 1 Record on Appeal 208. J'Noel testified

that she[4] also wanted a premarital agreement to prove to Marshall she was not marrying him for his money. 1 Record on Appeal 123. At the time, Marshall had a net worth of approximately $2,500,000; J'Noel's net worth was approximately $40,000. 1 Record on Appeal 118.

J'Noel testified she could never get Marshall to focus on the premarital agreement, but the chronology makes it clear Marshall was not getting married without one. 1 Record on Appeal 187. Two days after J'Noel filled out and signed a form premarital agreement, Marshall obtained a marriage license. 1 Record on Appeal 152, 166a. Two months passed and no ceremony occurred, and J'Noel could not get Marshall to complete the agreement. Unable to reach an agreement on the prenuptial issue, J'Noel prepared and signed a document that on its face waives her inheritance rights. 1 Record on Appeal 166, 187. This "waiver" was authored, prepared and signed by J'Noel in lieu of the form premarital agreement she had previously signed. 1 Record on Appeal 119, 187. J'Noel testified she prepared this "waiver" to force a resolution of this premarital agreement issue. J'Noel also testified that she told Marshall on numerous occasions that she was not marrying him for his money. 1 Record on Appeal 184, 187.

On September 25, 1998, six days after J'Noel authored and signed the waiver, Marshall and J'Noel participated in a marriage ceremony performed in Oskaloosa, Kansas. 1

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[4] The sex of J'Noel is an issue in this case. As a courtesy to J'Noel, who prefers this form of address, the feminine pronoun will be used throughout even though J'Noel remains a male.

Record on Appeal 119, 187. At that time, Marshall was 85 years old. J'Noel was 40. 1 Record on Appeal 116, 118.

The presentation of this scenario is important for the reason that the Petitioner attempts to paint the picture that Joe and Marshall were estranged and that his actions in the probate court were induced by improper motives. This is simply not the case.

Originally, Joe opposed J'Noel's spousal claim based solely on the waiver, but then discovered that J'Noel was born Jay Noel Ball, a male. 1 Record on Appeal 36, 66. Joe then amended his objection to include the defense that J'Noel is a male and any purported marriage between J'Noel and Marshall was therefore void. 1 Record on Appeal 66, 132-141.

All parties agree J'Noel was born a male in Wisconsin in 1957. 1 Record on Appeal 117, 172a, 2 Record on Appeal 545, 4 Record on Appeal 773-782. J'Noel testified in her deposition that she considered the fact that she was born with male genitalia to be a "birth defect". 1 Record on Appeal 178-178a.

J'Noel's original birth certificate, issued in Wisconsin, indicates that J'Noel was born a male. 1 Record on Appeal 232. Pursuant to a Report of Order dated August 8, 1994, an altered birth certificate was issued at J'Noel's request after a cosmetic surgery which indicates that J'Noel was born female. 1 Record on Appeal 233, 234.

Neither Marshall, Joe nor the State of Kansas were parties to the *ex parte* ministerial procedure in Wisconsin through which J'Noel's birth certificate was altered. 1 Record on Appeal 138; 4 Record on Appeal 773-782. The issue of J'Noel marrying Marshall or any other man in

Kansas was not raised in the *ex parte* hearing through which J'Noel changed her birth certificate. 1 Record on Appeal 138; 4 Record on Appeal 773-782. Petitioner submits no evidence or authority that the State of Wisconsin accepts J'Noel as a female for the purposes of marriage or inheritance. J'Noel bases her entire argument on the fact that she was able to procure a birth certificate reflecting a female status in the State of Wisconsin utilizing Wisconsin Statute §69.15(4)(b). Wisconsin courts have never passed on the validity of this statute and to the best of the knowledge of the Respondent the entire issue is unresolved in Wisconsin.[5]

REASONS FOR DENYING THE WRIT

I. The issue presented in J'Noel's Petition does not present a novel or new issue for this Court's review.

The issues raised by the Petitioner have already been presented to this Court in the case of *Littleton v. Prange*, 9

[5] Wisconsin has had "a definition of marriage" bill introduced each session since 1999 for its consideration. 1999 Assembly Bill 781 and 1999 Senate Bill 401. The bill defines marriage as being between one man and one woman and refuses Wisconsin's recognition of marriage other than between one man and one woman regardless of their validity in other jurisdictions. (Current law defines marriage as being between "husband and wife"). The intent of the Bill is to make sure that same sex marriages are not recognized in Wisconsin should another state decide to recognize it. The Bill has not passed as of the date of this Response.

S.W. 3d 223 (Tex.Civ.App.1999), *cert. denied*, 531 U.S. 872, 121 S.Ct. 174, 148 L.Ed.2d 119 (2000) and no new issues or arguments are presented in the petition.

On July 3, 2000, a Petition For Writ of Certiorari was filed in the case of *Christie Lee Littleton v. Dr. Mark A. Prange*, 9 S.W. 3d 223 (Tex.Civ.App.1999), *cert. denied*, 531 U.S. 872, 121 S.Ct. 174, 148 L.Ed.2d 119 (2000). A copy of the Petition is reproduced herein. Pet., App. 1a.

The *Littleton* case has been cited as legal precedent in every proceeding in the Courts below, albeit with different interpretations and applications.

The Petitioner in her brief fails to fully disclose that the very issues raised in her Petition were presented to this Court in the Petition on the *Littleton* case.

Respondent does not feel it is necessary to revisit all aspects of the Petition. The Petition in the *Littleton* case directly brought attention to the issue of amended official documents which indicate self-identifying sex.[6] The issue of full faith and credit and its relationship to an amended birth certificate obtained through an administrative process was fully and articulately briefed to this Court in the *Littleton* Petition. *See* App. 2, 6, 7, 9, 10, 11, 14, and 15.

There is nothing in J'Noel's Petition which warrants this Court to reconsider its previous decision not to grant a Writ of Certiorari concerning the issue of full faith and

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[6] The *Littleton* Petition provides a specific list of the states that have adopted such administrative procedures. App. 14. This list is apparently the same list referenced in Petitioner's Petition, at page 13.

credit. The Kansas Court of Appeals, in its decision relying on the *Littleton* case, presented a solid analysis as to why full faith and credit is not applicable to the case at hand. The Kansas Court of Appeals noted the similarities between the Kansas full faith and credit issue and the same issue as resolved by the *Littleton* case. Pet. App. 88a.

Judge Gernon's task was made much easier by reason of a unique Wisconsin Statute §69.21(1)(c) (2000) which reads:

> "Any certified copy of a vital record or part of a vital record issued under this subsection shall be deemed the same as the original vital record and shall be **prima facie evidence** of any fact stated in the vital record, **except** that **the evidentiary value** of a vital record filed more than one year after the event which is the subject of the vital record occurred or of **a vital record which has been amended shall be determined by the judicial or administrative agency or official before whom the vital record is offered as evidence.**"[7] (emphasis added).

Pet. App. 90a.

As Judge Gernon points out in his decision, both the original and amended birth certificates of J'Noel were presented to the District Court. The District Court, availing itself of Wisconsin's allowance to determine the

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[7] Wisconsin case law confirms that the original birth certificate is not conclusive evidence, but rather only *prima facie* evidence that can be rebutted and overcome by other evidence. *Lubnor v. Peerless Ins. Co.*, 120 N.W. 2d 54, 58 (Wis. 1963).

evidentiary weight to be given the birth certificate found it to be of no evidentiary value. Pet., App. 105a. It is clear that the Wisconsin statute contemplated a review of the administrative procedure by another state. In so doing, it opened the door to the reviewing state to make an independent decision as to whether or not the new birth certificate would violate the public policy of the reviewing state.

The Kansas Supreme Court properly exercised the discretion provided to it by the Wisconsin statute and found the marriage void because it violated the public policy of the State of Kansas.[8]

The Petitioner attempts to draw a strong correlation between the Wisconsin statute and the Kansas regulation which allows for an amended birth certificate to be issued subsequent to sexual reassignment surgery.[9] The Petitioner argues that Kansas has accepted transsexual marriages by reason of the adoption of this regulation. However, Judge Gernon, in his opinion in the Kansas Court of Appeals decision notes that the validity of this Kansas regulation is questionable.[10] He stated:

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[8] Kansas has declined to follow decisions from other states under the full faith and credit doctrine because they violated Kansas public policy. *State v. Pope*, 23 Kan. App. 2d 69, 927 P.2d 503, 511 (1996); *Head v. Platte County, Mo.*, 242 Kan. 442, 749 P.2d 6, 9 (1988); *Matter of Reed's Estate*, 233 Kan. 531, 664 P.2d 824 (1983). The public policy exception is widely recognized. *Gaillard v. Field*, 381 F.2d 25, 28 (10th Cir. 1967); *Application of Schatz*, 497 P.2d 153, 157 (Wash. 1972).

[9] K.A.R. 28-1720-20(b)(1)(A)(i).

[10] The authority to declare the public policy of the State of Kansas is vested in the legislature, not in the administrative agency. *Kansas*

(Continued on following page)

> "Here, it appears likely that, to the extent the regulation appears to allow for the change of sex designation on a Kansas birth certificate to respond to anatomical changes, it oversteps. It is highly unlikely a fundamental change of that nature was contemplated by the legislature when it passed K.S.A. 2000 Supp. 65-2422(c) on 'minor corrections'."

Pet. App. 88a.

If the Wisconsin statute were presented to the Wisconsin court today, the result would most likely be the same.

II. There is no actual conflict or issue as to whether the Wisconsin birth certificate is entitled to full faith and credit in Kansas.

The Petitioner argues that the full faith and credit clause requires the same exacting application to executive actions and non-adjudicatory court action that it does to judgments issued in one state between parties to an adjudication over a controversy that has been reduced to a judgment.

The rule, urged upon this court by the Petitioner, would require the expansion of the application of the full faith and credit clause to all records and public acts of all states. The full faith and credit obligation is exacting and is presently reserved for judgments issued in one state by a court with adjudicatory authority over the subject

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Human Rights Commission v. Topeka Golf Association, 18 Kan. App. 2d 581, 856 P.2d 515, 520 (1993).

matter and persons governed by the judgment. *Baker v. General Motors Corporation,* 522 U.S. 222, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998).

There are two general situations where a state must decide if a legal event in another state is entitled to full faith and credit under the full faith and credit clause of the United States Constitution. The Constitution's full faith and credit clause provides,

> "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and The Effect thereof." Art. IV, §1.

The precedent which has previously been laid down from this court differentiates the credit owed to laws (legislative measures and common law) and to judgments when it comes to the application of the full faith and credit clause of the United States Constitution. *Baker v. General Motors Corp., supra.* From the decisions of this Court two distinct rules of law have evolved to assist the various State Courts faced with the challenge of determining when and under what circumstances the public records, acts, and judgments, of the sister states shall be given "full faith and credit" in judicial proceedings in the interpreting state that occurred in a foreign state. Regarding judgments, the full faith and credit obligation is exacting. *Baker v. General Motors Corporation, supra.* A final judgment in one state, if rendered by a Court with adjudicatory authority over the subject matter and persons governed by the judgment qualifies for recognition throughout the land. *Baker v. General Motors Corporation, supra.* The full faith and credit clause does not compel "a

state to substitute the statutes of other states for its own statutes dealing with a subject matter which it is competent to legislate." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n,* 306 U.S. 493, 501, 59 S.Ct. 629 (1939).

Full faith and credit treatment forbids the second state from questioning a judgment rendered in a sister state. When presented to the courts of the second state, a judgment may not be denied enforcement based upon some disagreement with the "public policy" between the judgment and the law of the state of rendition. However, this does not mean that all judgments from one state must be blindly enforced in another, or that all judgments are subject to full faith and credit treatment. All judgments are not subject to full faith and credit treatment. *Baker v. General Motors Corp., supra.* An injunction rendered in Michigan does not necessarily apply to litigation between differing parties conducted in Missouri. *Baker v. General Motors Corp., supra.*

In the instant issue, however, there is no judgment rendered in one state over an adjudication. The public act that the Petitioner would have this Court apply the exacting standards of the full faith and credit clause (as it applies to the application of judgments) was the reissuance or amendment of the Petitioner's birth certificate in the State of Wisconsin. There was no adjudication between contesting parties. The actions taken by the Petitioner in Wisconsin were *ex parte*, ministerial in nature, and were taken by an agency within the executive branch of the State of Wisconsin, Wisconsin's Department of Vital Statistics. Here, the application of the full faith and credit clause, if applied in the manner urged upon this Court by the Petitioner, would completely remove and vacate all of the

precedent of this Court, vacate the decisions differentiating the credit owed to laws (legislative measures and common law), and that credit owed to judgments, and apply to all actions the same exacting standards that are presently required in the application of a full faith and credit clause analysis to judgments. This is a radical departure from the precedents this Court has laid down over the past 200 years and is best done, if at all, by the legislature, and not by unelected judges.

The trial court, the Kansas Court of Appeals, and the Kansas Supreme Court, in the instant case, all found no conflict between the full faith and credit clause and the decision not to recognize J'Noel Gardiner as a female for purposes of the Kansas Marriage Act. K.S.A. 23-101. In the instant case, of course, Marshall G. Gardiner (nor his estate) was not a party to the earlier "litigation" nor was he subject to the jurisdiction of the Wisconsin courts.

It has been stated that the beginning point of any full faith and credit analysis requires a determination of the effect the "judgment" has in the court of the issuing state. Following that protocol for a full faith and credit analysis establishes that the "judgment" that the Petitioner would seek to force upon Kansas and 48 other sister states is in fact, and was at the time of its taking, merely a ministerial act by an executive agency of the State of Wisconsin. Wis. Stat. Ann. §69.21(1)(c) (2000). Wisconsin authorized, through an *ex parte* court order, the Petitioner to cause her birth certificate maintained by an executive agency in the State of Wisconsin to be amended to reflect that she was born a female when, in fact, she was born male. J'Noel Gardiner remains male today. The force and effect of the alleged judgment from Wisconsin did not change J'Noel

from male to female. The legal force and effect of this action in Wisconsin, whether the same is styled a judgment or an administrative agency action, is nil. It changed the wording of her birth certificate from male to female. The statute that authorized and directed the administrative agency to take these actions and that maintained the records of birth in the State of Wisconsin also authorizes any court to put whatever evidentiary weight that court deems appropriate and lawful upon the subsequently issued amended birth certificate. The Wisconsin statute does not prevent any subsequent forum in or out of the State of Wisconsin from putting differential evidentiary values on such an amended certificate. Kansas did not blindly apply the label "female" to J'Noel Gardiner when Kansas determined the validity of the Petitioner's marriage to one of its citizens, Marshall G. Gardiner, who was at all times a Kansas resident. No violence was done to the full faith and credit clause of the United States Constitution by the State of Kansas. The Kansas court examined the actions taken in Wisconsin and determined that irrespective of those actions, and irrespective of whether or not they occurred in the executive branch, the judicial branch, or came about only as a result of actions taken in both branches, Kansas remained free to define which of its citizens may marry and under what circumstances, under Kansas law. This does no violence to the full faith and credit clause. This does not interfere with any of the force and effect of the actions taken in Wisconsin. This is in congress with the law of the State of Wisconsin. Petitioner's argument that there exists a distinction between the evidentiary value of a vital record which has been amended, and its substantive effect is to misapply Wisconsin Statute §69.21(1)(c). Clearly, through a plain interpretation of the statute, the trial court in Kansas correctly

decided that it could, irrespective of the sex that the Wisconsin document purported to record the Petitioner as being, entertain parole evidence on the point. Kansas gave the amended Wisconsin birth certificate all of the full faith and credit that the Wisconsin action was entitled to under the prior decisions of the United States Supreme Court and Wisconsin law.

Nowhere in the history of this litigation has the Petitioner urged upon any court below the proposition that the Kansas courts could not entertain parole evidence on the issue of the Petitioner's sex, merely because the Wisconsin *ex parte* court proceedings had resulted in a Wisconsin administrative agency modifying retroactively the Petitioner's birth certificate. This is the rule that the Petitioner would have this court adopt through the vehicle of applying the full faith and credit clause. That was clearly not the intention of the framers of the Constitution, nor is it in concert with the prior rulings of this court. Rules of evidence are procedural, not substantive. *Restatement (Second) of Conflict of Laws*, §137-139 (1969 and Rev. 1998). State procedural rules are not entitled to full faith and credit in a sister state. *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

If the first step in a full faith and credit analysis is to determine the effect that a judgment has in the issuing state, and that protocol is followed here, and the state court that issued the order would not give preclusive effect to the prior judgment, then the State of Kansas is under no requirement to provide greater efficacy to the Wisconsin action. *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996); *Union and Planters Bank v. Memphis*, 189 U.S. 71, 23 S.Ct. [illegible] 47 L.Ed. 712 (1903).

A conclusion that the issuing state would not give the prior judgment preclusive effect ends the inquiry making it unnecessary to determine the existence of any exception to full faith and credit. *Haring v. Prosise*, 462 U.S. 306 at 313, 314, 103 S.Ct. 2368, 76 L.Ed.2d 595 (1983).

If this court honors the "undoubted"[11] principle that courts need give a prior judgment no more force or effect than the issuing state gives it, then this court will deny the Petitioner's request for a Writ of Certiorari.

The Petitioner seeks a Writ of Certiorari arguing that Kansas denied full faith and credit to a judgment of a sister State, Wisconsin. However, Kansas in its decisional processing, examined the law in Wisconsin, the actions taken in the State of Wisconsin that resulted in the Petitioner receiving an amended birth certificate, and decided that Kansas could determine whether or not the Petitioner was male or female for purposes of the Kansas Marriage Act, K.S.A. 23-101, without violating the full faith and credit clause. Kansas merely applied Wisconsin Statute §69.21(1)(c) (2000) and examined parole evidence in order to determine what evidentiary value, if any, to place on the amended Wisconsin birth certificate. This statute clearly allows parole evidence. How a Court, tribunal, or other judicial officer could possibly determine the evidentiary

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[11] Concurring opinion of Justice Kennedy, Justice O'Connor, and Justice Thomas joined concurring in the judgment in *Baker v. General Motors Corporation*, 522 U.S. 222, 118 S.Ct. 657. These Justices concurred in the judgment of the Court which delivered the opinion in *Baker v. General Motors Corporation*, 522 U.S. 222 (1998) but did so utilizing a separate analysis.

value of an instrument amended, altered or reissued pursuant to the Wisconsin statute without the consideration of parole evidence is not explained by the Petitioner. This is no doubt because the Petitioner is in fact advancing an argument that no parole evidence can be considered without violating the full faith and credit clause. The Petitioner advances this argument notwithstanding the literal language of the Wisconsin statute which clearly states that a certified copy of a vital record is *prima facie* evidence of any facts stated in the vital records. The Wisconsin statute then goes on to say that there exists an exception to this *prima facie* rule for vital records filed more than one year after the event and, the evidentiary value of a vital record which has been amended shall be determined by "the judicial or administrative agency or official for whom the vital record is offered." Wis. Stat. Ann. §69.21(1)(c) (2000). Kansas did so correctly.

The simple fact is that Marshall G. Gardiner, his estate, and his son, were not parties to the Wisconsin proceeding. Nothing presented to the Kansas courts indicated that Wisconsin would take the novel assertion that its earlier issuance of a birth certificate changing the Petitioner's reported sex from male to female binds the State of Kansas (or any other party not before a Wisconsin court, and not otherwise subject to the jurisdiction of Wisconsin), to accept J'Noel Ball as female for all purposes and determines those absent parties' rights under Kansas law. Marshall G. Gardiner, subsequently his estate, and Joseph M. Gardiner, III, were not parties to the Petitioner's Wisconsin proceedings to change her birth certificate and had no opportunity to litigate the issue of J'Noel Ball, a/k/a J'Noel Gardiner's sex at the time of the birth

certificate's change. It can hardly be concluded that Wisconsin will prohibit Marshall G. Gardiner, Joseph M. Gardiner, III, or any of the parties who may succeed to their interest from challenging J'Noel's status as a female, merely because J'Noel Gardiner, then J'Noel Ball, availed herself of an administrative method whereby she could change her birth certificate from her reported sex at birth of male, to that of female.

Nothing in the Wisconsin order purports to have the authority to prevent any subsequent party who deals with J'Noel from challenging her in her asserted claim that she is a female. This, however, is the result that the Petitioner would have this court adopt. It is the logical result of following her argument to its logical conclusion. Put another way, her argument is this,

> I was born biologically a male. My chromosomes are that of a male, XY. I grew up a male. I married a female. I conducted myself outwardly as a male through the majority of my adult life. After my marriage to a female I came to grips with the fact that I had a mental illness, gender dysphoria. I now believe I am a female trapped in a male's body. I believe my male sexual organs were a 'birth defect'. I underwent surgery to remove certain of my male reproductive organs and have certain of my male reproductive organs altered to appear as female. I availed myself of an administrative procedure which allows me to go back to my state of birth and have a birth certificate reissued recording me as 'female' vs. my original as well as my chromosomal sex as male. Now that I have done that, no state anywhere, at any time, for any reason, can challenge my status as being a 'female', nor can any person for any reason ever challenge my status as a 'female'.

> This is so because those persons did not anticipate that I would, (in an *ex parte* proceeding) have the State of origin of my birth certificate issue an order which changed the actual sex on my original birth certificate from male to my desired sex of female. They failed to enter an appearance in that State court and they failed to object. No one can challenge my status as 'female' in any court except Wisconsin because to do so would be to violate the full faith and credit clause of the U.S. Constitution.

This is the logical conclusion that J'Noel would have this court apply through the vehicle of the full faith and credit clause. Her argument literally taken would prohibit any state, anywhere, at any time, from entertaining parole evidence as to her true sexual status. This, the Kansas Supreme Court and trial court declined to do. This the full faith and credit clause does not require.

III. The Congress of the United States has prescribed the manner in which this type of record shall be proved and the effect thereof.

There are additional reasons to deny the Writ independent of the arguments set forth above. The Defense Of Marriage Act, hereafter DOMA, 28 U.S.C.A. §1738c (1996) is the only general law the Congress of the United States has passed on the subject of marriage and what full faith and credit states must give to marriages in other states. The Congress of the United States has specifically legislated that "same sex" marriages entered into in sister states are not subject to the full faith and credit clause of the United States Constitution. DOMA, *supra*, specifically protects states from having to give full faith and credit to same sex marriages performed in a foreign State. In the

instant case, had the Petitioner entered into a marriage in a foreign state and had this issue been presented in the State of Kansas, under the general laws prescribed by Congress, DOMA, *supra*, Kansas would have been free to determine that that marriage was void under Kansas law without doing any injury to the full faith and credit clause of the United States Constitution. 28 U.S.C.A. §1738c, *Christie Lee Littleton v. Dr. Mark A. Prange, cert. denied.*, 531 U.S. 872, 121 S.Ct. 174, 148 L.Ed.2d 1119 (2000).

In fact, Congress had an opportunity at the time it entertained the passage of DOMA, *supra*, to address the issue of what full faith and credit the states should give to situations wherein an individual suffering from gender dysphoria had undergone sexual reassignment surgery, and subsequently obtained an amended, modified, or reissued birth certificate, and specifically declined to include any provision within the DOMA, *supra*, to require states to provide full faith and credit to those "acts and records" of foreign states. This is the very question that Kansas was presented with in the instant issue. That is, must Kansas give full faith and credit to a birth certificate that had been reissued, modified or amended, in a foreign state, as a result of sexual reassignment surgery. The Congress of the United States was reluctant to force upon 49 states through the vehicle of the full faith and credit clause, and DOMA, *supra*, the requirement that all states be pre-empted from applying their individual law on this issue and be required to adopt a regulation passed by any one state which has a procedure similar to the procedure utilized by the Petitioner here in the State of Wisconsin. It is the Congress of the United States, which has been charged by Article 4, Clause 1 of the Constitution, the full faith and credit clause, with the duty to prescribe the

manner in which the acts, records and proceedings of one state should be given full faith and credit by Courts of another state. That body has specifically declined to entertain the very proposition that the Petitioner suggests that this Court entertain by the issuance of a Writ of Certiorari. The Petitioner is in fact arguing that because Congress has not provided the remedy the Petitioner would desire, after Congress had an opportunity to do so in 1996, and every year in which the Congress has been in session since, that this Court should legislate by the vehicle of a judicial decision a remedy unavailable to the Petitioner through a general law of the Congress of the United States. In the first instance, it is the Congress of the United States which is tasked under Article 4, Clause 1 with the authority to prescribe the manner in which acts, records and proceedings shall be given full faith and credit among the various states. Constitution of the United States, Article 4, Clause 1. The novel approach of the Petitioner is that inasmuch as Congress has been reluctant to express its opinion, other than through DOMA and, that opinion is not favorable to the Petitioner's position, then this Court should correct that situation by rendering a decision legislative in nature, that the legislative branch of the government, the Congress assembled, has specifically declined to do. This is not the traditional role of the United States Supreme Court.

CONCLUSION

The Petitioner's argument would have this Court by the vehicle of a Writ of Certiorari adopt an entirely new analysis to the application of full faith and credit treatment to the acts, records and judgments of one State by another

State. The Petitioner's argument can be restated as follows:

> Wisconsin issued a birth certificate describing the Petitioner as 'female', and this was done through the vehicle of a combination of an *ex parte* Court order and a ministerial act within a governmental agency. Such events pre-empt foreign states from entertaining any parole evidence to determine whether or not that individual in fact meets the gender characteristics described in the newly acquired instrument from a foreign state.

This analysis is simplistic, and novel. It has never been adopted by this Court. The Petitioner boldly argues that the "relaxed standards governing the application of a foreign state's substantive law"[12] should in effect be abandoned by this Court. The Petitioner would have this Court apply the same exacting standards that are presently applied to judgments,[13] to any and all public acts and records of a foreign state. The Petitioner's rule if adopted by this court, would hold all states hostage to any one state which decided to adopt a procedure whereby sexual reassignment surgery could result in the issuance of a

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[12] Petition for Writ of Certiorari, p. 18.

[13] As used here, the term judgment means a judgment which is preclusive on the parties and preclusive on the issues. These judgments have historically been granted full faith and credit by all states, regardless of the hostility that the state of rendition may have with the underlying legal principles which support that judgment. *Baker v. General Motors Corp.*, 522 U.S. 222, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998).

modified or amended birth certificate changing the original sex of a citizen to that of the sex of that citizen's particular choice. Such an approach would cause the wholesale abandonment of the entire body of *juris prudence* articulated by this Court under the full faith and credit clause, ignore the general law of the Congress of the United States and, all of the prior opinions of this Court on this point. The full faith and credit clause has never had, nor was it intended by the framers of either the Articles of Confederation or the Constitution of the United States to grant such broad and sweeping authority to a single state. The rule urged upon this Court by the Petitioner would allow one state to control the definition of who may marry and under what circumstances in all 50 states, the country's territories, possessions and its commonwealth.

This Petition For a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN F. THOMPSON
DAVIS, BEALL, MCGUIRE & THOMPSON, L.L.C.
529 Delaware
Leavenworth, Kansas 66048
(913) 682-3822

TERENCE A. LOBER*
Attorney at Law
529 Delaware
Leavenworth, Kansas 66048
(913) 682-3825

**Counsel of Record*

Counsel for Respondent, Joseph M. Gardiner, III

Dated: July 22, 2002

App. 1

No. ___

IN THE
Supreme Court of the United States

CHRISTIE LEE LITTLETON,

Petitioner,

v.

DR. MARK A. PRANGE,

Respondent.

On Petition for Writ Of Certiorari
To The
Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

(Filed July 03, 2000)

ALYSON DODI MEISELMAN
Counsel of Record
PHYLLIS RANDOLPH FRYE
ALYSON MEISELMAN, Attorney at Law
14400 Lake Winds Way
North Potomac, MD 20878-4309
(301) 424-9314

Attorneys for
Christie Lee Littleton

QUESTIONS PRESENTED

The denial of the petition for discretionary review and the motion for rehearing by the Supreme Court of Texas, leaving the opinion of the Fourth Court of Appeals District of Texas intact, presents fundamental statutory and constitutional issues concerning the Full Faith and Credit provisions of Article IV, § 1, and, the equal protection clause of Amendment XIV, of the Constitution of the United States.

1. Whether Texas violated the Full Faith and Credit clause of Art. IV, § 1, in voiding a transsexual's constitutionally protected, private and intimate marital relationship, as a member of her medically assigned genital sex to a person of the opposite genital sex, without a compelling and sufficient state interest or proper governmental objective.

2. Whether the Equal Protection clause of Amendment XIV, applies equally to all women, including those who medical professionals identify as women, at birth or later, and, consequently, to all heterosexual marriages, regardless of whether the parties' genitals were present at birth or medically formed.

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PETITION FOR WRIT OF CERTIORARI

Christie Lee Littleton (hereinafter, "Mrs. Littleton") petitions for a writ of certiorari to review the decision of the Fourth Court of Appeals District of Texas, Opinion, having been denied discretionary review by the Texas Supreme Court.

OPINIONS BELOW

The opinion of the Fourth Court of Appeals (App. C 1-25) is reported at 9 S.W.3d 223 (Tex. App., 1999). The denial of discretionary review by the Texas Supreme Court (App. A 1) is reported at 10 S.W.3d No.2, SCTOL-4 (Tex.,

Mar. 14, 2000). The order denying motion for rehearing of the petition for review by the Texas Supreme Court (App. B 1) is reported at 15 S.W.3d No.2, SCTOL-2 (Tex., May 30, 2000).

JURISDICTION

The order denying discretionary review was entered by the Texas Supreme Court on March 2, 2000. (App. A 1.) The judgment of the Fourth Court of Appeals was entered on October 27, 1999. (App. C 1-25.) A motion for rehearing was timely filed with the Texas Supreme Court on April 18, 2000, which motion was denied on May 18, 2000. (App. B 1.) Petitioner states that the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257, to review this petition for certiorari.

CONSTITUTIONAL PROVISIONS

1. ARTICLE IV, Section 1, of the United States Constitution provides in pertinent part:

Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

2. AMENDMENT IX of the United States Constitution provides in pertinent part:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

3. AMENDMENT XIV, Section 1, of the United States Constitution provides in pertinent part:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case concerns the right of transsexuals to have their state sanctioned marriages recognized in a sister state when the transsexual changes state residence. It also involves a fundamental conflict among the states regarding the transsexual's right and ability to marry.

Specifically, the broad fundamental question is whether a legal marriage contract entered into in one state shall be given Full Faith and Credit by all sister states. Flowing from that question are two equally important questions. First, whether a transsexual is entitled to have her legal sex conform with the sex recognized by medical professionals, defined as the medically confirmed genital sex of the post-operative status, or, as the sex stated on an original birth record. And, second, whether the constitutionally protected right to marry extends to transsexuals.

As a constitutional matter, this case presents to this Court its first opportunity to answer the questions of whether the protections afforded to both men and women

under all the laws of our country apply equally to transsexual men and transsexual women, and settling divergent, and often opposing, decisions among several states, as well as the federal courts. In so doing, this case presents this Court with the opportunity to define what is a "male" and what is a "female."

The constitutional issues of full faith and credit and equal protection, as applied to the States by Amendment XIV, were first raised following the issuance of the written opinion of the Court of Appeals, Fourth District, 9 S.W.3d 223 (Tex. App., 1999) (App. C 1-25), where the appellate court issued an opinion and ruling that used criteria, including religious belief, supposition, and the federal Defense of Marriage Act, 28 U.S.C.A. §1738C (1996) rather than address the stipulated evidence and entire body of case law on this subject.

The Petitioner addressed these issues in the petition for discretionary review and motion for rehearing before the Supreme Court of Texas.

STATEMENT OF THE FACTS

Christie Lee (Cavazos) Littleton legally married Jonathan Mark Littleton[1] in Kentucky on December 31, 1989. On July 29, 1996, Mr. Littleton died as the result of alleged medical malpractice by Dr. Mark A. Prange. Mrs.

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[1] Since the early filings with Mrs. Littleton's previous counsel, her husband's first name has been repeatedly misspelled and all prior documents and court opinions have continued that misspelling. As her new counsel, we wish to respect the memory of Mr. Littleton, and have used the correct spelling of his first name throughout this Petition.

Littleton, along with the decedent's mother and the decedent's children by a previous marriage, filed suit for the wrongful death of Mrs. Littleton's husband against Dr. Prange.

In the course of discovery, Dr. Prange's counsel became aware that Mrs. Littleton's birth certificate stated, "Lee V. Cavazos, Jr., a male, born March 29, 1952." Mrs. Littleton freely disclosed that in 1977, she had petitioned a local Texas District Court for a legal change of name from Lee V. Cavazos, Jr. to a Christie Lee Cavazos. She also freely disclosed that in 1979, she had undergone corrective genital reassignment surgery.

In 1980, following the final stage of her corrective surgery, she applied for and Texas government officials issued a State of Texas, Department of Public Safety Identification Card, which indicated "SEX: F[emale]." The identification card application was supported by appropriate documentation, including the Texas District Court's Order changing the Petitioner's name and a sworn medical affidavit from her physician-surgeon (who had been salaried in part by the State of Texas).

The State of Texas, Department of Public Safety Identification Card was secured without any fraud: all parties (the Court, the Department's clerks and supervisors, and the physician-surgeon) were aware of everything about Mrs. Littleton's past, her transition, and her medical corrective genital reassignment surgery.

In 1988, Mrs. Littleton temporarily moved to Kentucky at which time she met Jonathan Mark Littleton. Using as identification her State of Texas, Department of Public Safety Identification Card, she and Jonathan Mark Littleton applied for and obtained a Kentucky marriage

license, indicating she as "bride" and he as "groom," and were legally married in Kentucky. Shortly, thereafter, the Littletons moved to Texas.

During the course of their six and one-half year marriage, the Littleton's, as many married couples, engaged in private, intimate, heterosexual vaginal-penile[2] sexual intercourse. They also filed federal income taxes as husband and wife, walked hand in hand along San Antonio's Riverwalk, enjoyed each other's companionship and company, and, were known in the community as husband and wife. They lived and loved, happily together, as husband and wife, until Jonathan Mark Littleton's untimely death in 1996.

Following discovery of Mrs. Littleton's medical past, Dr. Prange's counsel moved the trial court for and was granted a Partial Summary Judgment And Order Of Severance and a Modified Final Partial Summary Judgment And Order against Mrs. Littleton, alone.

The trial court did not take testimony. However, the parties had stipulated and submitted to two medical affidavits, both stating that Mrs. Littleton "is medically a female." *Littleton* at 232 (App. C 22).

The court ignored the medical evidence and Mrs. Littleton's amended birth certificate and dismissed Mrs. Littleton's cause of action based solely on the fact that her original birth certificate stated she was a male.

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[2] We apologize for what may seem overly graphic language, however, to accurately discuss the legal implications in this case on transsexuals and the intersexed, we cannot avoid using the correct medical terminology.

ARGUMENT AND REASONS FOR GRANTING THE PETITION

This Court should grant this petition for several reasons.

TEXAS VIOLATED THE FULL FAITH AND CREDIT CLAUSE OF ART. IV, § 1, IN VOIDING A TRANSSEXUAL'S CONSTITUTIONALLY PROTECTED, PRIVATE AND INTIMATE MARITAL RELATIONSHIP, AS A MEMBER OF HER MEDICALLY ASSIGNED GENITAL SEX TO A PERSON OF THE OPPOSITE GENITAL SEX, WITHOUT A COMPELLING AND SUFFICIENT STATE INTEREST OR PROPER GOVERNMENTAL OBJECTIVE.

Under the Constitution, Article IV, § 1, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." The Texas court's decision to refuse to recognize acts and public records of the Commonwealth of Kentucky, in the form of the validity of a marriage, violates the Full Faith and Credit clause. The Full Faith and Credit clause "implies that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home." *Chicago & Alton R.R. v. Wiggins Ferry Co.*, 119 U.S. 615, 622 (1887).

By invalidating the Littleton's marriage, Texas failed to give Full Faith and Credit to the Acts, Records, and Proceedings of a sister state, the Commonwealth of Kentucky, and its own Acts, Records, and judicial Proceedings which were properly recognized in Kentucky. In this case, Texas not only participated in the direct funding and services, including psychological and medical, needed for Mrs. Littleton, to correct and alter her genital sex from

male to female (Acts), but, additionally, approved and issued a State of Texas, Department of Public Safety Identification Card (Records), based upon two documents. The first document is a court order changing her name (judicial Proceeding). The second document is a sworn affidavit from her physician-surgeon indicating completion of corrective genital reassignment surgery. The analysis contained in the majority opinion of the Texas Court of Appeals invalidating the Kentucky marriage, failed to look at either the underlying Texas acts, records, and judicial proceedings, given Full Faith and Credit by the Commonwealth of Kentucky, or the human being before it.

The Littleton's *heterosexual* marriage was converted into a "same-sex" marriage only for the purpose of denying a transsexual female the right to seek redress for the death of her spouse at the hands of his physician.[3] The record does not contain any evidence that, at the time of the marriage, the Petitioner was anything but female. In fact, by stipulation, the record contains two affidavits stating that Christie Lee Littleton was medically a female.[4]

In contrast to the *Littleton* case, where corrective genital reassignment surgery completed the transition, the case of *B. v. B.*, 78 Misc.2d 112, 335 N.Y.S.2d 712 (1974), presented the opposite case of a female to male transsexual who had undergone a hysterectomy and mastectomy

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[3] In fact, Dr. Prange settled with the remaining parties to the suit, brought by Mrs. Littleton, for an undisclosed sum following the court issuing summary judgment against Mrs. Littleton.

[4] Presumably from the date she completed the corrective genital reassignment surgery.

but had not had a phalloplasty, the deciding fact upon which the New York court used to determine that where a male lacks the ability to perform sexually as a male, no valid marriage could exist. The constitutional difficulty presented in *B. v. B.* is that of equal protection (discussed below). For example, a male who is injured, suffers from erectile dysfunction, or has had surgery (orchiectomy) related to testicular cancer, is medically no different than a female-to-male transsexual, who, for economic reasons, is unable to afford expensive phalloplasty. Both appear to the public as males, with beards, muscles, and a deepened voice.

To define maleness as the ability to penetrate and femaleness as the ability to procreate is antiquated, not to mention incomplete and inherently unjust.

THE EQUAL PROTECTION CLAUSE OF AMENDMENT XIV, APPLIES EQUALLY TO ALL WOMEN, INCLUDING THOSE WHO MEDICAL PROFESSIONALS IDENTIFY AS WOMEN, AT BIRTH OR LATER, AND TO THEIR HETEROSEXUAL MARRIAGES, REGARDLESS OF WHETHER THE PARTIES' GENITALS WERE PRESENT AT BIRTH OR MEDICALLY FORMED.

The trial and appellate courts chose to ignore the only evidence in the record, and chose to base their decisions on religious beliefs. Justice Hardberger states in the second opening paragraph of the Opinion in *Littleton*, at 223 (App. C 2),

> ***"The deeper philosophical (and now legal) question is: can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably***

> ***fixed by our Creator at birth?"*** [Emphasis added.]

The above reference to a higher authority is the same rationale that had been used by racists and other bigots to justify segregation based on color, to justify hate crimes, and to justify discriminatory practices, and each was ultimately rejected by this Court as being Constitutionally prohibited, for example:

> *"Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."*

This pronouncement by the trial judge in *Loving v. Virginia*, 388 U.S. 1, 3 (1967), ultimately led to this Court's decision prohibiting anti-miscegenation statutes.

Next, the Court of Appeals of Texas, Fourth District, after ignoring the stipulated medical evidence, imposed its own "test" based on postulated genetic chromosome information.[5] Yet, neither Mrs. Littleton nor her deceased husband ever had a chromosome test. Thus, by granting and upholding Summary Judgment based on the aforementioned non-testing, and by assuming that the deceased Mr. Littleton was XY and Mrs. Littleton is *also* XY, the lower courts are requiring Mrs. Littleton to test herself

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[5] Based on unknown facts, as stated in *Jay v. Boyd*, 351 U.S. 345, 367 (1956), "No amount of legal reasoning by the Court and no rationalization that can be devised can disguise the fact that the use of anonymous information to banish people is not consistent with the principles of a free country."

and reveal that information in violation of Texas statutory public policy. Tex. Rev. Stat. Ann. Art. 9031 (Vernon 1999), which prohibits (with exceptions for which this case does not factually qualify) the use of genetic information by a "(8) State agency," defined to include the "judicial branch of state government."

Contrary to both Justice Hardberger's statement, *Littleton*, at 230 (App. C 14), and Justice Angelini's concurring opinion, *Id.*, at 231 (App. C 18), that the Texas Legislature has not spoken, the Texas Legislature has spoken on the confidentially of genetic testing. First in Tex. Rev. Stat. Ann. Art. 9031 (Vernon 1999), and then in Tex. Lab. Code Ann. § 21.402-21.403 (Vernon 1999) (prohibiting discrimination in employment based on genetic information). It may be of interest to this Court that the American Medical Association has spoken on the confidentiality of genetic testing. (See, AMA Code of Medical Ethics, Code of Medical Ethics, §§ 2.132, 2.135, 2.137, 5.08, and, 5.09 (1996-97). Texas does not have a statute requiring chromosomal testing as a prerequisite to marriage, nor does any other state.

Curiously, though not in the instant record, when it suited the purpose of the State of Texas, the Attorney General of Texas forced Mrs. Littleton, as the wife of Mr. Littleton in a community property state, to pay child support for Mr. Littleton's children from a prior marriage, even when he was ill and unemployed, as indicated on the Form 1040, jointly filed by the Littletons with the Internal Revenue Service.[6]

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[6] The IRS accepted eight joint Form 1040 filings for the six and one half-year marriage.

Our whole system of law is predicated on the general, fundamental principle of equality of application of the law. *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943). Yet, as pointed out by the dissent in *Littleton*,

> "While a birth certificate would ordinarily establish a persons' gender conclusively, Christie presented significant controverting evidence that indicated she was female. This evidence was so substantial that it raised a genuine issue of material fact about where she was Jonathon's surviving spouse. In an ordinary summary judgment case, such controverting evidence would prevent this court from concluding that the movant had met its burden on a motion for summary judgment. But in this rather extraordinary case, *the majority has determined that there are no significant facts that need to be determined* and concluded that Christie is a male as a matter of law. *Despite this conclusion, there is no law to serve as the basis of this conclusion.*" [Emphasis added.]

Littleton, at 232. (App. C 22.)

A. Conflicting State And Federal Decisions

Texas' treatment of transsexuals as being capable of marriage for child support purposes, but declaring those same marriages void for estate purposes or wrongful death causes is contradictory and patently discriminatory. In this fact pattern the state has asserted one individual is female and the wife for collection of child support, and allowed a private litigant to claim that the same individual is male to prevent the wife from asserting her rights as the survivor of her husband.

Taking this situation to its logical conclusion, Mrs. Littleton, while in San Antonio, Texas is a male and has a void marriage; as she travels to Houston, Texas, and enters federal property, she is female and a widow; upon traveling to Kentucky she is female and a widow; but, upon entering Ohio, she is once again male and prohibited from marriage; entering Connecticut, she is again female and may marry; if her travel takes her north to Vermont, she is male and may marry a female; if instead she travels south to New Jersey, she may marry a male. The ability of Mrs. Littleton and many other transsexuals to freely travel, including travel without risk due to their sex status (e.g., which bathroom she may legally use), and to move and reside in many parts of this country is in question.

This case presents this Court with the opportunity to again correct and unify the path being traveled by the States with regard to the rights of citizens who are transsexuals, just as this Court has done for those individuals who have been subject to discrimination based on the classifications of race, sex, national origin, ethnicity, and religion.

There is no provision in any law, act, statute or ordinance in this land that abolishes or removes the rights of individuals to constitutionally protected freedoms if they choose to alter their being, in this case, by lawful, partially state-publicly funded, corrective genital reassignment surgery aimed at presenting a congruent self. This includes statutes that address the issue of gender transition more specifically than those of Texas, including that of Kentucky, the state in which the Littletons' marriage took place. *See* Ky. Rev. Stat. Ann. § 213.121 (5) (1999). Also significantly, neither the federal Defense of Marriage Act, 28 U.S.C.A. §1738C (1996), nor any of its

State counterparts, addresses the situation of a marriage involving a transsexual.

The only prior decision by this Court involving a transsexual was the case of *Farmer v. Brennan*, 511 U.S. 825 (1994), a unanimous decision (with concurring opinions). In *Farmer*, a pre-operative transsexual, who had undergone estrogen therapy, breast implants, and an "unsuccessful" orchiectomy, had been subject to discriminatory practices within the federal prison system. This Court remanded the matter to the lower courts instructing them to appropriately consider the transsexual's complaint.

Several jurisdictions in this country have addressed the problem posed by the facts of the *Littleton* case. For example, in *Darnell v. Lloyd*, 395 F. Supp. 1210, 1214 (D. Conn. 1975), a U.S. District Court held that there was "no state interest . . . whatsoever" in the arbitrary refusal to grant state recognition of a transsexual's "current sexual status."

In Ohio, a trial court published an opinion in the case *In re Ladrach*, 32 Ohio Misc.2d 6, 513 N.E.2d 828, 832 (Ohio Probate Court, 1987), a declaratory judgment action in which the court decided that a post-operative transsexual female (born in Ohio) was not allowed to marry a male (because Ohio does not have a law allowing amendment to birth records).

In New Jersey, the state Supreme Court, in the case *M.T. v. J.T.*, 140 N.J.Super. 77, 355 A.2d 204 (1976), upheld a marriage, between a transsexual female and a male, in awarding support and maintenance upon divorce.

Interpretation of the exact same fact pattern and Texas statutes at issue in the instant state case resulted in an opposite federal ruling in *Benefit Determinations Involving Validity of Marriage of Transsexual Veterans*, VAOPGCPREC 15-90, 05-25-90 8-23 Marriage 7-2 Med. Treat-Repro. Function Vet. Aff. Op. Gen. Couns. Prec. 15-90, 1990 WL 605201 (D.V.A.),[7] holding:

> "Under Texas law, where a veteran has anatomically changed his/her sex by undergoing sexual-reassignment surgery and has thereafter legally married a member of his/her former sex, his/her marriage partner may be considered the veteran's spouse for the purpose of determining entitlement to additional vocational rehabilitation allowance payable on account of a dependent spouse."

B. Recent International Decisions

Justice Thomas recognized in his concurring opinion in *Farmer*, that, "evolving standards of decency * * * mark the progress of a maturing society." *Ibid.*, at 859 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). Evolution has

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[7] In this case arising in Houston, Texas, the relevant facts before the Veteran's Administration included: transition in 1977, surgery in 1985, name change order in 1986, marriage in 1987, V.A. claim filed in 1988, Order to amend birth cert. 3/9/89, Tx Dept. of Health, Bureau of Vital Statistics amended birth record 5/10/89, appellate decision in 1990.

For comparison Mrs. Littleton's facts: transition about 1965, name change order in 1977, surgery in 1979, marriage in 1989, wrongful death law suit filed in 1997, Order to amend birth certificate in 8/7/98, Tx Dept. of Health, Bureau of Vital Statistics amended birth record 8/14/98, appellate decision in 1999.

not escaped the English case of *Corbett v. Corbett*, 2 All E.R.1 33 (P. 1970), (a reported trial level opinion which decided that for the purpose of marriage, chromosomes are dispositive and thus determine one's sex).

Many jurisdictions, around the world, that had previously followed the analysis in *Corbett*, Id., have evolved to expressly, and some forcefully, repudiate Judge Ormrod's inflexible edict. For example, as stated in an Australian repudiation,

> "Whatever may once have been the case, the English language does not now condemn post-operative male-to-female transsexuals to being described as being of the sex they profoundly believe they do not belong to and the external genitalia of which, as a result of irreversible surgery, they no longer have.
>
> * * *
>
> "Negative attitudes towards transsexuals are based fundamentally on religious and moral views and assumptions which are slowly changing in modern society. . . . "

Secretary, Dept. of Social Security v. S.R.A. (1993) 118 A.L.R. 467, 472, 493 (Fed. Ct. Gen. Div. Australia).

In New Zealand, in *Attorney-General v. Otahuhu Family Court*, (1994) 1 NZLR 603, 607, "If society allows such persons to undergo therapy and surgery in order to fulfil that [the desire to alter their genital sex] desire, then it ought also to allow such persons to function as fully as possible in their reassigned sex, and this must include the capacity to marry."

The Court of Justice of the European Communities, continuing the momentum against the *Corbett* philosophy, in an appeal of Case C-13/94, *P. v S. and Cornwall County Council*, a case originating in England, issued a Judgment Of The Court on April 30, 1996, stating in part, at paragraph 7, "Under English law [referring to *Corbett*], P. [who is a male-to-female transsexual] is still deemed to be male." Then, in overriding England's assertion, this highest European Court stated,

> "21. Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.
>
> "22. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard."

C. Equal protection includes all women.

The marital relationship, held as a right so basic and fundamental and so deeply-rooted in our society, while not mentioned specifically in the Constitution, has been determined, in a concurring opinion of this Court, to be one of those unremunerated rights within the Amendment IX. *Griswold v. Connecticut*, 381 U.S. 479, 488, 491, 492, 499, 502 (1965). Additionally, this fundamental right is protected under the Amendment XIV, due process clause.

Loving, supra, at 12; *Griswold, supra*, at 486; *Zablocki v. Redhail*, 434 U.S. 374, 383-87 (1978).

Under cases beginning with *Griswold v. Connecticut*, 81 U.S. 479 (1965), and heightened by *Roe v. Wade*, 410 U.S. 113 (1973), a fundamental right, such as marriage, carries with it the burden on government that any restraint be justified under a "compelling state interest" analysis. Further, following *United States v. Virginia*, 518 U.S. 515, 533 (1996), this Court directed the focus of a reviewing court to determine whether the state's justification is "exceedingly persuasive."

Marriage is an economic partnership, *Kahn v. Kahn*, 801 F. Supp. 1237 (S.D.N.Y., 1992), or a civil contract between parties, *Fornshill v. Murray*, 1 Bland 479 (1828), and procreation is not a requirement.

Therefore, in regard to the ability to marry, there must be a compelling state interest to justify discriminating between a female who has had a complete hysterectomy (removal of uterus and ovaries) and is hormonally supported by hormone replacement therapy (HRT), and, a female who's vagina was surgically created and who is hormonally supported by HRT, or, for that matter, a female who has been in a serious automobile accident, and who has had pelvic reconstruction, including a neo-vagina.

The *Littleton* court failed to apply either a compelling state interest" or an "exceedingly persuasive justification" analysis for declaring Mrs. Littleton a male and voiding her Constitutionally protected Kentucky marriage under Texas law.

D. Birth Record Amendments, Corrections, & Prohibitions.

The Texas legislature has not passed any statute on the issue of a transsexual amending a birth record. However, "a number of other states have determined that transsexuals who have undergone corrective genital reassignment surgery are entitled to amend their official documents to indicate their self-identified sex."[8] *See, e.g.*, Ala. Code §22-9A-19 (1997); Ariz. Rev. Stat. Ann. § 36-326(a)(4) (West) 1993); Cal. Health & Safety Code §§103,430, 103,425 (West 1997); Colo. Rev. Stat. Ann. § 25-2-115(4) (1990); D.C. Code Ann. § 6-217 (d) (1995); Ga. Code Ann. § 31-10-23(e) (Harrison 1998); 10 Guam Gov't. Code § 3222 (1998); Haw. Rev. Stat. § 338-7.7 (1993); 410 Ill Comp. Stat. Ann. § 535-17 (West 1997); Iowa Code Ann. § 144.23.3 (1997); La. Rev. Stat. Ann §40:62 (West 1992); Md. Health-Gen. I Code Ann., § 4-214 (Lexis 1995); Mass. Gen. Laws Ann. Ch. 46 § 13 (West 1993); Mich. Comp. Laws § 333.2891 (1998); Miss. Code Ann. 41-57-21 (1998); Mo. Ann. Stat. § 193.215(9) (West Supp. 1999); N.M. Stat. Ann. § 24-14-25 (D) (Michie 1997); N.C. Gen. Stat. § 130A-118(b)(4) (1997); Or Rev. Stat. § 432.235 (4) (1997); Utah Code Ann. § 26-2-11 (Supp. 1998); Wis. Sat. Ann. § 69.15 (West 1990).

Tennessee specifically prohibits changes to birth records based upon corrective genital reassignment surgery. Tenn. Code Ann. § 68-3-203(d) (1996).

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[8] Greenberg, Julie A., *When Is A Man A Man, And When Is A Woman A Woman?*, ___ Fla. L. Rev. ___ (Sept. 2000).

Whether or not Mrs. Littleton's birth certificate indicated "male" or "female" at the time of her marriage is not relevant, or, stated in its best light, placing form over substance. The fact remains that at the time she married Jonathan Mark Littleton, Mrs. Littleton was female, both physically and mentally, and legally. Since neither Texas nor Kentucky require presentation of a birth certificate as a prerequisite for obtaining a marriage license, and require only a state issued identification,[9] the marriage was legal and entitled to be given Full Faith and Credit by the Texas courts, and Mrs. Littleton was entitled to the protections afforded by the equal protection clause of Amendment XIV.

E. Impact of this Case, Nationally.

As mentioned in the statement of the case, an equally important question is whether the constitutionally protected right to marry extends to transsexuals, and if so, whether, as, either the *male to female* bride versus groom, or, the *female to male* groom versus bride.

Christie Lee Littleton was a bride for six and one-half years, and was a widow for another three years until the Texas Court of Appeals converted her heterosexual marriage

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[9] Tex. Fam. Code Ann. § 2.005 (b) (West 1999), states: **"The proof must be established by a** certified copy of the applicant's birth certificate or by some certificate, license, or **document issued by this state,** the United States, or a foreign government." [Emphasis added.] Ky. Rev. Stat. Ann. § 400.100 (5)(b) (West 1999), states: "Vital information for each party, including full name, date of birth, place of birth, race, condition (single, widowed, or divorced), number of previous marriages, occupation, current residence, relationship to other party, full names of parents." [No statutorily required identification.]

into a "same-sex" marriage, then voided it, and, made her only eligible for marriage as a *male to female* groom.

Contrast this case to the Veteran's Affairs Opinion, *supra*, the *female to male* groom in that federal ruling was sensibly allowed to remain a groom, and, the Texas marriage to his female bride was allowed to stand.

The resolution of this issue has a direct effect on the tens-of-thousands of persons who are transsexuals, the millions of people who are intersexed,[10] and the millions of people who transsexuals and the intersexed have married or seek to marry. While the exact incidence of transsexuality and intersexuality are unknown, some estimates indicate that between 3,000 and 10,000 transsexuals have undergone hormonal and corrective genital reassignment surgery and live in the United States. Another 30,000 to 60,000 people consider themselves candidates. *See* David W. Meyers, *The Human Body and the Law*, 221 (2d ed. 1990). Although the exact incidence of intersexuality is uncertain, the intersexed constitute between one-tenth of one percent and four percent of the population. *See*: Anne Fausto-Sterling, *The Five Sexes: Why Male and Female are not Enough,* SCIENCES, Mar.-Apr. 1993, at 20-21; Alice D.

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[10] The intersexed are those humans who have chromosome patterns other than XX or XY. For example, XYY, XYYY, XO, XXY, XXXY and any other of the numerous combinations currently identified. Most intersexed individuals initially do not know that they are intersexed, especially those who are older adults, for whom testing was not available, or, those who are younger adults, who have had no outward physical manifestations, medical, or reproductive fertility problems, and, those who are children, who are under the care and control of their parents. *See,* Greenberg, J., *Defining Male and Female: Intersexuality and Collision Between Law and biology,* 41 Ariz. L. Rev. 265 (1999).

Dreger, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX at 43 (1988).

A number of cases addressing the rights of transsexuals are in various stages of litigation. For instance, in Kansas, a male-to-female post-operative transsexual's right to inherit from her husband's estate is on appeal. In California a post-operative male-to-female transsexual married a female in England. Her employer, the Los Angeles fire department, contested the validity of her marriage (the case recently settled). In New Hampshire, the U.S. Postal service is refusing to acknowledge a male-to-female transsexual's right to be treated as a female. Finally, in Vermont, a male-to-female transsexual forced the state to issue a license to marry a woman because the state had refused to amend her birth certificate to read "female" (resulting in a legal, but socially appearing same sex marriage).

Contrary to Justice Hardberger's statement in *Littleton*, that, "Christie is medically termed a transsexual, ***a term not often heard on the streets of Texas***, nor in its courtrooms," [Emphasis added.] *Id.*, at 225 (App. C 5), in the past four decades since Renee Richards sued to establish her rights to play tennis professionally (*Richards v. U.S. Tennis Ass'n*, 93 Misc. 2d 713, 400 N.Y.S.2d 267 (1977)) the media have repeatedly put transgendered topics before the public.[11]

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[11] Public issues involving transsexuals and the intersexed is evident from the following sampling: *The Washington Post* (Jun 2000); *The Washington City Paper* (Sep 1999); *Esquire Magazine* (Apr 1995); news shows such as Good Morning America, A&E Investigative Reports; television talk shows like Donahue and Oprah; sitcoms like

(Continued on following page)

The *Richards* court, in analyzing the criteria to determine ones sex, stated, "However, it [referring to chromosomes] is not and should not be the sole criterion, where as here, the circumstances [clear anatomical and psychological evidence of femaleness] warrant consideration of other factors." *Ibid.*, at 721.

F. Defense of Marriage Act (DOMA) Issue

Applying DOMA, 28 U.S.C.A. §1738C (1996), to the *Littleton* case is tantamount to applying an *ex post facto* law in a criminal case. In *Littleton*, both the marriage and Jonathan Mark Littleton's death occurred before DOMA was enacted. In the *Littleton* decision, *supra*, at 226 (App. C 5), Justice Hardberger justified voiding a marriage under the public policy law enacted to protect states from having to give Full Faith and Credit to "same-sex" marriages entered into in sister states. By applying DOMA to a heterosexual marriage he first had to find Mrs. Littleton to be male to convert it into a prohibited marriage.

However, the courts and legislatures making the determination that "same-sex" marriages are illegal were considering gay and lesbian marriages. They were not considering marriages involving post-operative transsexuals. Adding transsexuals into the marital equation makes

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Night Court. The Drew Carey Show, Becker, and Will & Grace, and drama, including Picket Fences, Chicago Hope, and Judging Amy; in addition motion pictures dealing with transgender issues include "Some Like It Hot," "Victor/Victoria," "La Cage aux Fax" and "Birdcage," "Rocky Horror Picture Show," "Tootsie," "To Wong Foo, Thanks for Everything, Julie Newmar" and recently, "Boys Don't Cry" and "The Brandon Teena Story."

identifying "same-sex" marriages more theoretically problematic, but not insurmountable. The present public policy of promoting only heterosexual marriages becomes upset when the society views a transsexual's heterosexual appearing marriage under a microscope (looking at issues other than the presentation of the couple).

> ***"Every schoolchild, even of tender years, is confident he or she can tell the difference, especially if the person is wearing no clothes."*** *Littleton*, at 223 (App. C 1).

CONCLUSION

Maintaining an orderly society is a lawful objective of government. Important issues of Full Faith and Credit of lawful marriages, equal protection for transsexuals, and the conflicting decisions among several states and federal authorities as to the status of transsexuals regarding marriage have reached this Court for decision and guidance.

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

/s/ Alyson Meiselman
ALYSON DODI MEISELMAN
Counsel of Record
PHYLLIS RANDOLPH FRYE
ALYSON MEISELMAN,
Attorney at Law
14400 Lake Winds Way
North Potomac, MD 20878-4309
(301) 424-9314

Attorneys for Christie Lee Littleton

BRIN & BRIN, P.C.
ATTORNEYS AT LAW

1202 THIRD STREET
CORPUS CHRISTI, TEXAS 78404
TELEPHONE (361) 881-9643
FAX (361) 883-0506

tnye@brinandbrin.com

[Addresses Omitted In Printing]

July 17, 2000

Mr. William K. Suter
Clerk, Supreme Court of the United States
One 1st St. NE
Washington, D.C. 20543

Re: Supreme Court Case No. 00-25
Littleton, Christie L. v. Prange, Mark A.

Dear Mr. Suter:

Enclosed please find the Waiver of Response to Petitioner's Petition for Writ of Certiorari which we ask that you file with the papers in the above referenced cause. A copy is being forwarded to counsel of record herein.

Thank you for your attention to this matter.

Sincerely yours,

/s/ Thomas F. Nye
Thomas F. Nye

TNF/sam
Enclosures
99014

cc: Ms. Alyson Meiselman
14400 Lake Winds Way
North Potomac, Maryland 20878-4309

WAIVER

SUPREME COURT OF THE UNITED STATES

Supreme Court Case No. 00-25

Littleton, Christie L. v. Prange, Mark A.
(Petitioner) (Respondent)

I DO NOT INTEND TO FILE A RESPONSE to the petition for a writ of certiorari unless one is requested by the Court.

Please check one of the following boxes:

☒ Please enter my appearance as Counsel of Record for all respondents.

☐ There are multiple respondents, and I do not represent all respondents. Please enter my appearance as Counsel of Record for the following respondent(s):

_____

_____

I certify that I am a member of the Bar of the Supreme Court of the United States (Please explain if your name has changed since your admission):

Signature /s/ Thomas F. Nye

Date: July 17, 2000

(Type or print) Name Thomas F. Nye
☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm Brin & Brin, P.C.

Address 1202 Third Street

City & State Corpus Christi, Texas Zip 78404

Phone 361-881-9643

A COPY OF THIS FORM MUST BE SENT TO PETITIONER'S COUNSEL OR TO PETITIONER IF *PRO SE*. PLEASE INDICATE BELOW THE NAME(S) OF THE RECIPIENT(S) OF A COPY OF THIS FORM. NO ADDITIONAL CERTIFICATE OF SERVICE IS REQUIRED.

SEE REVERSE FOR INFORMATION CONCERNING THE STATUS OF A CASE ON THE DOCKET.

Supreme Court of the United States

No. 00-25

Christie Lee Littleton,
Petitioner

v.

Mark A. Prange

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals of Texas, Fourth District, No. 04-99-00010-CV.

ON CONSIDERATION of the petition for a writ of certiorari herein to the Court of Appeals of Texas, Fourth District.

IT IS ORDERED by this Court that the said petition be, and the same is hereby, denied.

October 2, 2000

A true copy WILLIAM K. SUTER
Test:
Clerk of the Supreme Court of the United States
By _____
Deputy